No. 10497

In the United States Circuit Court of Appeals

For the Ninth Circuit

B. H. PRENTICE,
Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the estate of DR. W. J. ROSS COMPANY, a Corporation Bankrupt,
Appellee.

Appellant's Answering Brief

B. H. PRENTICE, in Pro Per
4705 Firestone Blvd.,
South Gate, California,
For Appellant.

CRAIG & WELLER,
THOMAS S. TOBIN,
817 Board of Trade Bldg.,
111 West Seventh Street,
Los Angeles, California,
For Appellee.

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Appellant's Answering Brief

In view of the misstatements by counsel for Appellee as well as the insinuations respecting the motives of this appellant as contained in appellee's brief it becomes necessary to reply not only to the legal questions involved in the instant case, but also to the personal attack made on this appellant.

Possibly certain documents not vital to the record were included in appellant's designation of the Record on Appeal. Also apparently through the ignorance of this appellant certain essential documents of a juris-

dictional nature were omitted from appellant's designation of contents of Record on Appeal.

However it would seem to this appellant that this Court in order to be fully acquainted with the facts should have before it all the record having any bearing on what transpired in the lower court.

Counsel objects to the inclusion in the record of Appellant's Points and Authorities in support of Petition to review Order Confirming sale of Real Property. (T. R., 33-39). It would seem necessary if this Court is to rule on the decision of the lower court that this appellant should inform this Court as to the grounds the original motion to the District Court was based upon.

Petitioner's statement of Facts in Lieu of Reporter's Transcript was a part of the record reviewed by the District Court and by the way, nowhere in the record does this appellant find any statement to the effect that the Referee "refused to sign" the petitioner's statement as is stated in appellee's brief (Pg. 2).

The document designated "Deposit to Guarantee to Estate Better Price for the sale of Certain Real Property" is in this appellant's opinion quite properly a part of the record in that it constituted the giving of notice to the District Court that this appellant was a bona fide purchaser who actually intended to complete the purchase of the property. Appellee's counsel would have this court believe that this appellant's acts

in prosecuting this appeal were governed by "some sinister or ulterior motive" (appellee's Brief, Pg. 11), and his reason for attending the sale was to "either deprive the purchaser of the fruits of its purchase or hold it up for a higher price" (appellee's brief, Pg. 17). Counsel even goes so far as to state in his brief that the plant of the Baruch Corporation, he believes, adjoins the property in question (appellee's brief, Pg. 16). This one statement by the appellee is a fair sample of how carelessly the truth of the matter is stated by appellee. As a matter of fact the only plant that is adjacent to the property in question on the north side of Firestone Blvd., is a refinery situated on a five acre parcel of real property. Both this refinery and the five acre parcel of real property are owned outright by this appellant, which fact is well known to Mr. Baruch of the Baruch Corporation.

The Notice of Motion to Amend Referee's Certificate is a necessary part of the record unless this court declines to consider any other document except the Referee's Certificate on Review when going into the question of what transpired at the sale on March 10, 1943. That this Court would do so is hardly possible in view of the statement in the Referee's Certificate to the effect that the record as prepared is to the best recollection of the Referee and that no stenographer's report was taken or kept of the proceedings (R. 16-17). This certificate is dated April 13, 1943 (R. 19) some 33 days after the sale was held. As opposed to this is the statement contained in Mr. Clements' af-

fidavit to the effect that "Immediately after leaving the court room (of the Referee) both Mr. Prentice and this affiant (Mr. Clements) made copious notes of what had there transpired, to which notes this affiant has repeatedly referred in preparing this affidavit and the statements made in this affidavit conform to the information as set forth in the said notes" (R. 57-58).

There are so many inconsistent statements in the Referee's Certificate on Review that it certainly raises the question of which statements are correct and which are in error.

For instance the Referee states Mr. Clements represents the Smileage Co., Ltd. (R. 13). Mr. Clements under oath states "that he is not now nor has he at any previous time ever been a representative of, or had any connection with, the Smileage Company or the Smileage Co., Ltd., or any partnership or firm having a similar name" (R. 54). This is a matter of some importance which this appellant believes this Court can decide as to which of the statements are true and which error. And while we are speaking of Mr. Clements' affidavit wherein he states on oath that at 9:40 A. M. on the date of sale he "noticed on the large table adjacent to which he seated himself a signed confirmation of the sale to the Baruch Corporation having a consideration of Twenty-two Hundred Fifty ($2250.00) Dollars, of the property which was advertised to be sold at 10 A. M. that day" (R. 54-55). Appellee states that

this was manifestly untrue inasmuch as the confirmation of sale was not signed until March 16, 1943 and furthermore the Order recites in the body thereof the appearance of Prentice and "his attempt to upset the sale" (appellee's brief, Pg. 12). Might it not be possible that Mr. Clements did see a signed confirmation of sale as he states and that when it became apparent that there was to be some controversy over the conduct of the sale that this confirmation of sale was laid aside and a new order drawn and signed and filed?

Counsel also objects to the printing in the record of an Order Dismissing Petition for Review and Affirming Order of Referee as prepared by Counsel for appellee and served on this appellant. This last document "which was not signed by Judge McCormick at all" (appellee's brief, pg. 2) contained among other mis-statements the following: "The Court further concludes that this Petition for Review was not filed within the time prescribed by Sec. 38-C of the National Bankruptcy Act, and that no extension of time to file said petition for review was obtained" (R. 63). Bearing in mind that this quoted paragraph was a part of appellee's document it is not surprising that Judge McCormick did not sign it and that another and very different "order Confirming Referee's Finding" was signed by Judge McCormick (R. 67-71) in lieu thereof. There was no intention or desire on the part of this appellant to "load this record." Appellant's only wish was and is to present fully and fairly the facts involved that this Court may decide the issue.

The appellee states in his brief, "However, as certified by the Referee, he expressly announced that the proceeding was not a public auction, in other words that it was merely the confirmation of a negotiated private sale and that no raise would be considered less than 10%. This announcement, no doubt, was made in order to give creditors an opportunity, if they so desired, to raise the bid 10% if dissatisfied therewith" (appellee's brief, p. 18). This is far, far from the truth and one has but to look at the Referee's Certificate on Review to learn the true facts about this particular phase of the case. The Referee's Certificate on Review has this to say, "Whereupon the Referee asked for higher bids on the property set forth in the Return of Sale but said he would not consider any bid that was not at least 10% higher than the $2250.00 bid by the purchaser named in the return of sale" (R. 14) and also speaking of who was present at the sale the Referee's Certificate on Review says: "that there were present the following persons: Mr. Baruch representing the successful bidder, to wit, the Baruch Corporation; Mr. Burr H. Prentice and Mr. Clements representing the Smileage Company, Ltd." (R. 13). This would seem to dispose of appellee's thought that the auction was for the purpose of allowing creditors to bid the property up if they so desired. There were no creditors present at the sale. While it may be immaterial this appellant has been informed by counsel for the Baruch Corporation that Mr. Baruch was not present at the sale but did have a representative

there. Apparently if this be true the Referee was in error as to just who was there representing the Baruch Corporation.

THE FACTS

The order authorizing the trustee to sell the property in question was worded as follows:

> "It is ordered that the trustee herein be, and he is hereby authorized and directed to sell, at private sale or at public auction, to the highest and best bidder or bidders therefor, the real property —(and here follows the legal description of the property in question)—*any sale of said real property is to be made subject to the confirmation of this court.*" (Italics ours.)

If the Trustee did during a seven months' period actually make an honest endeavor to sell the property, it is strange that he did not contact this appellant who owns and operates the refinery adjacent to the property in question. Counsel states that the trustee "was fortunate in being able to negotiate a sale with the Baruch Corporation." (Appellee's Brief, p. 2.) Possibly so.

The Petition to review Referee's Order was mailed in Los Angeles on March 26, 1943, and was addressed to the Referee at his office address in Santa Ana (R. 32). The Referee in his Certificate on Review states that he did not receive the document until March 29th, although it was postmarked in Los Angeles March

26th (R. 32). As to why there were three days consumed in the transmission of this registered letter a distance of thirty-five miles is a mystery to this appellant. However the facts speak for themselves. When this appellant learned of this delay a motion was promptly made that the time wherein to file Petition to Review Referee's Order be extended to March 31, 1943, which motion was granted by Judge McCormick (R. 70). There is ample authority for the granting of such order.

THE DISTRICT COURT HAD AUTHORITY TO EXTEND TIME WHEREIN TO FILE PETITION TO REVIEW REFEREE'S ORDER.

Thummess v. Von Hoffman, 109 Fed. 2nd 291, at 292-293.

In the case cited the ten day period following the entry of the referee's order expired without a petition for review having been filed or an extension of time for such filing having been made—The lower court entered an order extending the time for the filing of the petition to review for five days. From the order extending the time to file the Trustee appealed. In the decision of the United States Circuit Court of Appeals, Third Circuit, it is stated:

> "The question here is simply one of legislative intent, and as to that, we are of the opinion that the court below acted within its power when, for cause shown, it extended the time for the filing of a petition for review after the expiration of the

ten days following the entry of the order of the referee."

The case here cited is an exact parallel with the case now before this Court. There was never any question raised as to the sufficiency of the motion or the affidavit supporting the same. Therefore we have simply the question of whether the District Court had authority to extend the time wherein to file.

See:

In re Albert, 122 Fed. 2nd 393-394.

In this quoted case, through an oversight, an attorney for a creditor failed to file a petition to review a referee's order within 10 days after the entry of such order. The appellant moved for an order extending the time wherein to file. The judge denied the motion. An appeal was taken and in the decision of the United States Circuit Court of Appeals, Second District, it is stated:

> "We think the statutory limitation of ten days is not a condition upon jurisdiction and that in the exercise of a sound discretion an extension may be granted though not applied for until after the time for filing a petition to review has run."

The order of the District Court refusing to grant an extension of time wherein to file the Petition to Review Referee's Order was reversed.

See:

Sec. 39, sub. C, of the Chandler Act; 11 U.S.C.A. 67

provides:

> "A person aggrieved by an order of a referee may within ten days after the entry thereof, *or within such extended time as the court for cause shown allow,* (italics ours) file with the Referee a petition for review of such order by a judge. . . ."

In the instant case the time wherein to file was extended by the District Judge—No question is presented as to whether the cause shown was good or not. It is therefore presumed that it was good.

THE AMOUNT INVOLVED IS NOT LESS THAN $500.00

Gaye v. Pumpelly and others, 108 U. S. 164-165.

In this quoted case a motion was made in the U. S. Circuit Court, Northern District of Illinois, to dismiss for want of jurisdiction. In the original suit there was involved a tax bill for $1120.79 and costs of suit. There was some question as to the value of the property involved. Several affidavits stated the value of the property to be less than the statutory requirements of $5000.00 and several affidavits were to the effect that the value of the property exceeded $5000.00. In the

decision of the U. S. Supreme Court, Mr. Chief Justice Waite says:

> "Many of the affidavits sent up with the transcript stated distinctly that the value of the property, which is the matter in dispute, exceeds $5000.00. When an appeal has been allowed after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high. There is no such decided preponderance of the evidence in the case against jurisdiction as to make it our duty to dismiss the appeal which has been allowed —Motion denied."

In the above quoted case the original sum involved was $1120.79 plus costs. At no place in the decision of the Supreme Court is any mention made of this sum as having any bearing on the question of jurisdiction. The only question raised was, What is the value of the property?

In the instant case the question of jurisdiction does not hinge on the $50.00 or $75.00 difference between the various bids. The question is, Does the Value of the property involved exceed $500.00? The answer is unquestionably, Yes it does. The value as established by the trustee's Return of Sale of Real Property (R. 21) is $2250.00. This sum the Trustee swears is the full value of the estate's interest in the real prop-

erty (R. 23). This appellant contends the value is in excess of that sum: to wit, $2325.00. In any event there can be no question but that the value exceeds $500.00.

See:

England v. Ducasse, 104 Fed. (2) 760.

In this quoted case a claim in the total sum of $2273.83 was presented and which claim was allowed by the court in the sum of $427.57. There is no question but that the difference between the two sums would be the amount involved.

In the instant case, however, there is no question of a partition of the real property. Either this appellant is entitled to be adjudged the purchaser of the entire property at the offered price of $2325.00, or he is entitled to nothing. It follows, therefore, that the amount involved is the value of the title to the real property, namely $2325.00. In all cases cited on this point by appellee the items involved in the appeal constituted monies. There was no question raised in any cited case as to the jurisdiction of this Court to decide whether the lower court erred in deciding who should have title to real property valued at in excess of $2000.00.

There seems to be some misapprehension in appellee's mind as to the sale of the property.

IT WAS ERROR FOR THE COURT TO CONFIRM THE SALE OF THE PROPERTY TO THE LOWEST OF THREE COMPARABLE BIDS.

Prentice was a bidder at the sale. At the time he bid for the property there had been no confirmation of sale to Baruch Co.—Their position was that they had submitted a written offer to buy supported by a 10% deposit. Before the sale was confirmed to them Prentice raised the bid and likewise supported his bid with a 10% deposit. This is not a situation where after confirmation of a sale Prentice attempted to have the sale upset so that he could bid more than the sale price. As the highest bidder he was entitled to purchase the property. This point was covered in Appellant's Opening Brief.

Neither is there any question raised by Appellant of the adequacy of the price.

There is no question raised as to irregularities in the lack of an appraisal or in any published notice of the sale of the property.

This appellant repeats: The sole and only question raised is "Was it an abuse of discretion for the referee to accept the lowest of three comparable bids for the property."

CONCLUSION

Appellant finds very little pertinent matter in appellee's brief. There is a great deal of space devoted to an attempt to vilify the character of both Mr. Pren-

tice and Mr. Clements and to call this Court's attention to how very interested Mr. Boteler, Mr. Craig, Mr. Weller and Mr. Tobin are in maintaining the stability of judicial sales in bankruptcy.

Possiby this is essential to the appellee's presentation of his case. Appellant however questions its necessity.

Respectfully submitted,

B. H. PRENTICE,
In Pro Per.